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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. —

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

BRANDTJEN & KLUGE, INCORPORATED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of the Secretary of Labor, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above case on December 15, 1955.

OPINIONS BELOW

The opinion of the District Court (R. 81–86) is reported at 129 F. Supp. 675. The opinion of the Court of Appeals (App. *infra*, pp. 22–36) is reported at 228 F. 2d 291.

JURISDICTION

The judgment of the Court of Appeals (App. *infra*, pp. 36–37) was entered on December 15, 1955. By order of Mr. Justice Frankfurter,

dated March 9, 1956, the time for filing a petition for a writ of certiorari was extended to and including April 9, 1956, and by his further order dated April 5, 1956, was again extended to and including May 12, 1956 (App. *infra*, pp. 37–38). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the enactment of Section 7 (e) of the Fair Labor Standards Act, which was added by the Amendments of 1949, was intended to expand the application of the *Belo* decision (*Walling* v. *Belo Corp.*, 316 U. S. 624) so as to exempt from the overtime requirements a contract specifying *any* hourly rate however unrelated to payments made for hours actually worked, and to overturn this Court's subsequent decisions which limited the application of *Belo* to contracts specifying a true and actually operative hourly "regular rate" and not simply a fictitious rate.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended, c. 736, 63 Stat. 910 (29 U. S. C. 201, *et seq.*), are as follows:

> SEC. 7 (a) Except as otherwise provided in this section, no employer shall employ any of his employees * * * for a workweek longer than forty hours, unless such employee receives compensation for his

employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * * *

(e) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of forty hours if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in section 6 (a) and compensation at not less than one and one-half times such rate for all hours worked in excess of forty in any workweek, and (2) provides for a weekly guaranty of pay for not more than sixty hours based on the rates so specified.

STATEMENT

This action was brought by the Secretary of Labor under Section 17 of the Fair Labor Standards Act to enjoin respondent from violating the overtime requirements of the Act (Section 7). The case was submitted on stipulated facts, the issue being whether under these facts respondent's guaranteed wage contracts meet the conditions for the overtime exemption provided by Section 7 (e), *supra*.

1. Respondent is a Minnesota corporation which is engaged in the manufacture, sale, distribution, installation, and repair of printing presses, related equipment, and parts. It operates throughout the United States with headquarters in St. Paul, Minnesota, and eleven branch offices in various cities and states (R. 9). At each of the branch offices, except the one in Minneapolis, it employs one or more persons known as "erectors." The number of erectors employed at any one time varies, but during the period from August 1, 1950 to September 6, 1953, a total of seventeen erectors worked for the company. Each one was employed under a standard form of contract, a sample of which is attached to the Stipulation of Facts as "Appendix A" (R. 9–10, 14).

The duties of the erectors "necessitated irregular hours of work," and respondent has executed a separate contract with each of them. The terms of each "individual contract," however, are uniform, except that in a few instances the amounts of the weekly guarantee and the corresponding "basic" hourly rate have been different.[1] The terms of the contract state that the employee will be paid at the basic hourly rate for the first 40 hours and at one and one-half times such basic

[1] Most of the contracts (for 11 of the 17 erectors) uniformly provided a weekly guarantee of $66.30 ($132.60 biweekly) with a corresponding "basic" hourly rate of $1.27½, subsequently raised to a $69.42 weekly guarantee ($138.84 biweekly), with a corresponding "basic" hourly rate of $1.33½.

rate for time over 40 hours, provided that he shall receive not less than the weekly guarantee "for regular time and for such overtime as the necessities of the business may demand." The contract includes the further qualification that the weekly guarantee "is subject to adjustments for vacations, absences, and any other conditions not within the control of the company" (R. 14).

While the formal terms of the contracts do not so state, the stipulated facts show that the amount of the "basic" hourly rate is computed from a mathematical formula which assumes that the amount specified as the weekly guarantee is equivalent to pay for a workweek of 48 hours with overtime compensation for eight hours included therein (R. 10–11, 17–80). The 48 hour workweek is used indiscriminately as the basis for computing the hourly rate specified in all the contracts, although it has no relation to the usual range of hours actually worked either by the individual erector or by the group as a whole, and likewise takes no account of the marked differences in the actual working hours of individual erectors (see payroll transcription sheets and the chart summarizing them, attached to the Stipulation of Facts, R. 15, 17–80). These payroll transcriptions sheets, which cover the three year period preceding the filing of the suit, also show that, in fact, most of the erectors rarely worked any overtime at all and were regularly paid the amount of the weekly guarantee for

their normal nonovertime workweek of 40 hours or less. Although on rare occasions some of the erectors worked 48 hours or more, the actual working hours of all of them were usually substantially less. As a whole, the group worked less than 48 hours over 95% of the time and worked no more than 40 hours weekly almost 80% of the time.[2]

On the few occasions when an employee worked more than 48 hours he was paid one and one-half times the "basic" hourly rate for hours in excess of 48, in addition to the weekly guarantee. Some of the employees, however, *never* worked more than 48 hours so that there was never any occasion for consideration of their "basic" hourly rate in determining the wages actually paid. Six of the other employees exceeded the 48 hours in only a single week each during a three year

[2] A chart compiled from respondent's records covering the period from August 1, 1950 to September 6, 1953 summarizes the pertinent statistics on the actual hours of work (see Appendix B to Stipulation of Facts, R. 15). This chart shows that, during the entire period of slightly over three years, only one of the 17 employees had over five weeks in which he worked in excess of 48 hours. The group as a whole exceeded 48 hours in only 2.9% of the time, and worked as much as 48 hours in only an additional 1.4% of the time. Thus, as a whole, they worked less than 48 hours over 95% of the time and worked no more than 40 hours weekly almost 80% of the time. Some of the individual erectors worked no more than 40 hours weekly as much as 90% of the time. And the average workweek for the individual employee ranged from a low of 32.5 hours to a high of 42.60 hours, with an average for the group of 37.86 hours.

period, three others in only two weeks each, one in four weeks, one in five weeks, and the one remaining employee in 16 weeks (R. 15).

2. The Court of Appeals, affirming the District Court, held that respondent's wage plan complied in all respects with the requirements of Section 7 (e), *supra*. Its decision was premised on its view that this section was enacted "in order to give specific legislative sanction to wage arrangements of the 'Belo' type" [referring to this Court's decision in *Walling* v. *A. H. Belo Corp.*, 316 U. S. 624], by prescribing "self sufficient," "detailed statutory guides" to replace all of this Court's decisions which had established principles for determining whether the arrangement was a valid bona fide one or an invalid fictitious one. Though expressly recognizing that "the legislative history makes clear that Congress had the Belo decision in mind" when it enacted Section 7 (e), the court stated it could not infer that Congress meant Section 7 (e) "to be merely clarifying language approving the principle of the *Belo* case as elaborated and applied in subsequent court decisions" (App. *infra*, p. 30). It inferred, instead, that Section 7 (e) "enables the courts to make a fresh start" in determining the validity of such wage agreements guided solely by "the unambiguous language" of the new section, "whatever the courts might have held without the statutory

guidance of Section 7 (e)." *Id.* at 31. The court concluded, therefore, that it was unnecessary to look beyond the bare terms of respondent's wage contracts to determine whether the specified hourly rates were actually operative "regular" rates, or merely fictitious rates unrelated to payments regularly made for the employees' actual working hours, but that the "regular rate" requirement of Section 7 (e) was satisfied if the amount of the contract hourly rate is mathematically consistent with the amount of the weekly guarantee specified (App. *infra*, p. 34).

REASONS FOR GRANTING THE WRIT

The decision below represents a drastic departure from the basic principles established by this Court's rulings, prior to the 1949 enactment of Section 7 (e), construing the term "regular rate" on which the overtime requirements of the Fair Labor Standards Act depend. The assumption on which the decision below rested, that Section 7 (e) constituted a sweeping repudiation of those decisions, is wholly untenable; it is not only contrary to the statutory terms used in that section, but is also refuted by the legislative history as well as the common understanding of the meaning and intent of the provision at the time it was enacted. The issue is of large importance in the administration and enforcement of the overtime provisions of the Act, as this Court has recognized in granting certiorari in

numerous previous cases involving similar wage arrangements. The ruling below, if allowed to stand, will encourage the revival of artificial schemes to circumvent the overtime requirements which had been reasonably restrained by the Court's decisions following the *Belo* case,[3] and will thus immeasurably undermine the basic overtime policy of the Act. At present, the issue directly and immediately affects hundreds of employees working under contractual arrange-

[3] *Walling* v. *A. H. Belo Corp.*, 316 U. S. 624, upheld a contractual arrangement for employees working irregular hours whereby a "basic" rate of pay per hour was specified for the maximum hours fixed by the Act, time and one-half this "basic" rate was specified for "overtime," and the employee was guaranteed a certain fixed sum each week covering both regular time and overtime. The employee had to work more than 54½ hours before he became entitled to any pay in addition to this weekly guarantee but the additional hours were paid for at time and one-half the contractual "basic" rates. In contrast to the instant case, however, in *Belo* the overtime workweek was characteristic and typical of the employment actualities, the actual working hours being in excess of the statutory 40-hour week over 80% of the time (see record in *Belo*, No. 622, Oct. Term 1941, pp. 194–337) and there were sufficiently frequent occasions when employees earned more than their weekly guarantees (*i. e.* when the contractual basic rate was actually used to determine the weekly amount paid) to warrant the conclusion that the guarantee was not simply compensation "actually paid the employee for the normal non-overtime workweek", but also included compensation for actual overtime work—so that the contractual hourly rate "did in fact set the actual regular rate at which the workers were employed" (*Walling* v. *Youngerman-Reynolds Hardwood Co.*, *supra*, 325 U. S. at 424, 426).

ments which are now being litigated in other courts, and there are bound to be comparable arrangements all over the country if the broad rule laid down by the First Circuit remains in effect.

"1. The construction of Section 7 (e) by the decision below, without support in either the statutory terms or the legislative history, implies a flat repudiation of a line of important decisions by this Court which established basic and far-reaching principles for the administration and enforcement of the overtime requirements of the Act. *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419, *Walling* v. *Harnischfeger Corporation*, 325 U. S. 427, *Walling* v. *Helmerich & Payne, Inc.*, 323 U. S. 37, *Madison Avenue Corporation* v. *Asselta*, 331 U. S. 199, and *Bay Ridge Operating Co., Inc.* v. *Aaron*, 334 U. S. 446, rehearing denied, 335 U. S. 838. Writs of certiorari were granted in these cases, it seems reasonable to assume, because of the Court's awareness of and concern over the potentialities for abuse of the *Belo*-type contract to circumvent the statutory overtime policy.

This line of decisions made it unmistakably clear that the mere formal specification of an hourly rate in a guaranteed wage plan is insufficient to qualify the rate as a true "regular rate" within the meaning of the overtime provisions of the Act, and that a *Belo*-type contract is valid only "*provided it is not a mere artifice unrelated*

to wage earning actualities" (see concurring opinion of Mr. Justice Frankfurter, *Walling* v. *Harnischfeger Corp., supra,* 325 U. S. at 433, emphasis added).[4] The Court held that the specified hourly rate must bear some significant relation, not merely in the formal contract terms but in actual operation, to the normal payments actually received for actual working hours, in order to qualify as a true "regular rate." If the contractual hourly rate has no significant relation to actual payments, if there is never, or virtually never, any occasion for reliance on the rate in determining the compensation actually paid, then it is merely a device for labelling part of the regular normal nonovertime pay as so-called overtime compensation simply for the purpose of avoiding payment of any real overtime compensation. A contract fixing an hourly rate solely by such a mathematical manipulation plainly does not in fact set an actual "regular rate" at which the worker is employed.

This was made very plain in the case of *Walling* v. *Youngerman-Reynolds Hardwood Co., supra,* where the court said (325 U. S. at 426):

The [*Belo*] case is no authority, however,

[4] See also Mr. Justice Frankfurter's references in his dissenting opinion in the *Bay Ridge* case, *supra,* 334 U. S. at 488–489, to agreements which have "mislabeled the true circumstances of the employment relationship" or "misrepresent the regular situation", labeling as "regular" that which is in actual practice "exceptional".

> for the proposition that the regular rate may be fixed by contract at a point completely unrelated to the payments actually and normally received each week by the employees.

Similarly, in *Walling* v. *Helmerich & Payne, Inc.*, *supra*, the wage plan was held invalid because "respondent's plan made no effort to base the regular rate upon the wages actually received or upon the hours actually and regularly spent each week in working" (323 U. S. at 41). In another decision a few years later this Court reiterated that a contractual hourly rate, in order to qualify as a "regular rate", must reasonably represent "actual fact" and "the hourly rate actually paid for the normal non-overtime workweek," and added that "in testing the validity of a wage agreement under the Act the courts are required to look beyond that which the parties have purported to do" and to "the operation of the plan in actual practice." *Madison Avenue Corp.* v. *Asselta*, 331 U. S. at 204, 209.

Section 7 (e) does not in terms, of course, refer to any of these decisions, but, significantly, it retains the term "regular rate of pay" as the basic standard, and that is the term construed in the *Belo* and in all of the above-cited decisions of this Court. The new section also includes "bona fide," which was a consideration in all of this Court's decisions construing *Belo*-type con-

tracts.[5] Thus, plainly, the statutory terms do not show that Section 7 (e) was intended to repudiate all of this Court's decisions construing the term "regular rate," and to validate a contract which simply labels *any* rate as the regular hourly rate so long as, when multiplied by an equally arbitrary figure (up to 60 hours), it mathematically equals a guaranteed weekly salary. Had Congress intended *any* specified hourly rate to be sufficient, it would have been simple enough merely to require specification of an "hourly rate" instead of a "regular rate".

Nor is there any warrant in the legislative history for the inference that Congress intended to open the door wide to artificial and fictitious *Belo*-type contracts which this Court repeatedly held invalid and carefully distinguished from the agreement upheld in *Belo*. The main sponsor of Section 7 (e) himself described the section simply as giving "specific legislative approval to *Belo*-type contracts (*upheld by the United States Supreme Court*)" (95 Cong. Rec., p. A–5476 (1949), emphasis added.) Clearly, this

[5] There is no justification for the assertion in the opinions below that "There does not seem to be any dispute either as to the fact that the employees are employed pursuant to bona fide individual contracts" (App. *infra*, p. 35), if this means to imply an admission by the Government that the contracts satisfy the "bona fide" conditions of Section 7 (e). The assertion patently begs an important aspect of the very question here in issue, *i. e.* whether an identical form contract, used indiscriminately for the group and wholly unrelated to the actual working situation of any individual employee, is a "bona fide individual" contract.

statement cannot reasonably be construed as approving *Belo*-type contracts which this Court had held *invalid*.

That the section was not so intended was immediately and uniformly recognized by those most concerned with its meaning. Not only was it construed by the Government as simply giving express legislative approval to contracts meeting the standards prescribed by the existing decisions of this Court (*Interpretative Bulletin on Overtime Compensation*, 29 C. F. R., Pt. 778, Sec. 778.18, issued Jan. 1950), but even before the Government's construction was announced employer representatives so construed it. The view uniformly expressed was that the new Section 7 (e) was intended to incorporate and reaffirm the subsequent Supreme Court decisions which limited the application of the *Belo* decision. Within less than a week after the enactment of the 1949 Amendments, the Chamber of Commerce (which can hardly be accused of construing this Act over-expansively) issued a pamphlet, through its Employer-Employee Relations Division, entitled *What the 1949 Wage-Hour Act Means* (November 1, 1949), which, after describing the facts of the *Belo* arrangement, advised employers of the effect of the new Section 7 (e), as follows (at p. 11):

> This type of agreement was legalized under the original Act, but *severely limited by the courts* to situations in which

> the exact conditions noted above were met. *The new law reaffirms these decisions,* as well as the requirements a *Belo* contract must meet, but limits the number of hours per week on which the guaranty may be based to 60. [Emphasis added.] [6]

See also Charles H. Livengood, Jr., *The Federal Wage and Hour Law* (1952), a publication of the American Law Institute's Committee on Continuing Legal Education in collaboration with the American Bar Association, where it is stated (at p. 143):

> As in the *Belo* and *Halliburton* cases, from which Sec. 7 (e) derived, the courts will probably look for a nonfictitious relation between the hourly rate and the weekly guarantee.

Thus, the inference drawn by the decision below, that Congress had a much broader intent to provide "a fresh start * * * whatever the courts might have held without the statutory guidance

[6] Another employer representative, attorney for the Mutual Boiler Insurance Company, also within a few days after the enactment, published the same advice. See *A "Belo" Primer for 1950*, by William Conant Brewer, Jr., Labor Law Journal, November 1949, p. 94. After reviewing at length the court decisions bearing on *Belo*-type contracts, the author concludes (at p. 160):

"In the *Belo* case, the guarantee was exceeded in about twenty per cent of the weeks worked. The court looked upon this as evidence of good faith in the setting of the regular rate, *and it is unlikely that a guarantee which is never exceeded will be upheld, even under the statute.*" [Emphasis added.]

of Section 7 (e)" (App. *infra,* p. 31), plainly does not rest on any tangible manifestation of intent. Had Congress intended to expand the *Belo* decision and to repudiate all of this Court's subsequent decisions, certainly it is reasonable to assume that the legislative discussions would contain some indication of that purpose; such drastic action would not have been taken *sub silentio.*[7] But the only statement of the purpose of Section 7 (e) was Congressman Lucas' statement (*supra,* p. 13) which was limited to *Belo*-type contracts "upheld" by this Court.

In the absence of any tangible evidence of a broader, more drastic intent, the decision below rationalizes its construction by surmising that "it may be that in the economic conditions prevailing in 1949 the Congress did not deem this policy [to spread the work by exacting a premium for overtime] to be so strong and controlling as it might have been in 1938 when the Act was originally passed" (App. *infra,* p. 28). The suggestion, at this late date, that the 40 hour workweek is a policy tied solely to the unemploy-

[7] Certainly, at the very least, the First Circuit's construction is not so "plainly and unmistakably" correct as to warrant such a broad extension of the Section 7 (e) exemption, in the face of the well settled principle that "any" exemption in this Act must be "narrowly construed" and limited to situations "plainly and unmistakably within its terms." *Phillips Co.* v. *Walling,* 324 U. S. 490, 493; *Powell* v. *United States Cartridge Co.,* 339 U. S. 497, 517.

ment conditions prevalent at the time of the original enactment of the Act in 1938, is somewhat surprising in view of the persistent adherence to it as an established basic working standard through all the intervening years, which included the economic conditions of the wartime period when there was a shortage of labor and no unemployment problem. At that time, when some 20 odd bills were introduced in Congress proposing the suspension or restriction of all overtime laws,[8] every responsible official opposed the proposal, and none of the bills was enacted. The blanket suspension provisions of the Smith Bill (H. R. 6790) were rejected by an overwhelming vote when proposed as an amendment to the Second War Powers Bill of 1942 (88 Cong. Rec., 77th Cong., 2d sess., p. 1708 ff., 1758). Two other attempts to attach similar amendments to other legislation were likewise rejected.[9]

Equally untenable is the suggestion in the opinion below that the legislative disapproval of this

[8] House Bills Nos. 6616, 6689, 6790, 6792, 6795, 6796, 6814, 6823, 6826, 6835, 7054 and 7731, and Senate Bills Nos. 2232, 2573 and 2884 of the 77th Cong., 2d sess.; Smith Amendment in the House to S. 2208, 88 Cong. Rec. 1708, and O'Daniel amendments in the Senate to S. 2250 and S. 2748, 77th Cong., 2d sess., 88 Cong. Rec. 3241–3243, 8653; House Bills Nos. 992, 1804 and 2071 and Senate Bills Nos. 190 and 237, 78th Cong., 1st sess.

[9] Senator O'Daniel's proposed amendment to S. 2250 (on mobilization of small business for war production) (88 Cong. Rec., 77th Cong., 2d sess., 3241–43); and Senator O'Daniel's proposed amendment to S. 2748 (to amend the Selective Training and Service Act of 1940) (*id.* at 8653).

Court's decision in *Bay Ridge Operating Co., Inc.* v. *Aaron,* 334 U. S. 446, supports the inference that Congress intended a sweeping repudiation of all of this Court's other decisions construing the overtime requirements of the Act (App. *infra,* pp. 30–31). The so-called "overtime on overtime" principle of the *Bay Ridge* decision was unmistakably overturned by another *separate* section of the 1949 amendments (Section 7 (d), subsections (5), (6) and (7) and Section 7 (g), App. *infra,* p. 39). But, far from evidencing an intent to overturn this Court's other decisions bearing on *Belo*-type contracts, this very explicit reversal of the specific effect of the *Bay Ridge* decision supports the opposite conclusion with respect to those other decisions. For Section 7 (d) is the section specifying, in utmost detail, the payments which shall not be included in the term "regular rate," and specifically provides that, apart from the detailed exceptions, the "regular rate" as used in Section 7 "shall be deemed to include *all remuneration* for employment paid to, or on behalf of, the employee * * *" [Emphasis added]. Section 7 (e), which is a separate section, then proceeds to use the term "regular rate" as one of the conditions necessary to qualify for its particular exemption.

2. The importance of this issue is attested by the numerous previous decisions of this Court construing the term "regular rate" (*supra,* p. 10). The principles of these cases have guided the administration and enforcement of the overtime

provisions of the Act for many years, and have been widely accepted by employers, as is evidenced by the above quoted interpretations of the effect of the new Section 7 (e) (*supra*, pp. 14–15). The rule of the holding below, which rests on the assumption that Congress has now repudiated these decisions, will, if allowed to remain, encourage widespread resort to artificial and fictitious wage contracts which can largely nullify the basic policy of the Act to establish the 40 hour workweek as a national working standard. Such efforts are still being made, and will doubtless receive fresh impetus and vigor from the opinion below. In one pending case alone, which is presently awaiting decision by the Court of Appeals for the Second Circuit, 600 employees are subject to wage arrangements substantially similar to the contractual arrangements involved in the instant case. *Mitchell* v. *Hartford Steam Boiler Inspection and Insurance Co.*, No. 23739, argued and submitted on January 18, 1956. Another case, also pending in the same Court of Appeals, involves the validity of a comparable union contract arrangement affecting the statutory overtime rights of all employees covered by the agreement between the Greater New York Tailors Expressmen's Union and the Clothing Express Drivers and Helpers Union. *Mitchell* v. *Meyer Feinberg*, No. 23464, also argued and submitted on January 18, 1956. The large impact of the issue is clear.

3. Although there is at present no conflict be-

tween the decision below and the decisions of another Court of Appeals,[10] the First Circuit's holding is in conflict with the District Court's decision in *Mitchell* v. *Feinberg, supra,* 123 F. Supp. 899 (E. D. N. Y.), as well as with numerous other district court rulings throughout the country. *Sikes* v. *Williams Lumber Co.,* 123 F. Supp. 853 (E. D. La.); *Tobin* v. *Aronow,* 96 F. Supp. 279 (D. Mont.); and unofficially reported decisions in *Tobin* v. *Morristown Poultry Co.,* 10 WH Cases 571, 21 Labor Cases, Par. 66,798 (E. D. Tenn.); *Tobin* v. *Keystone Mfg. Co.,* 10 WH Cases 636, 21 Labor Cases, Par. 66,911 (W. D. Ark.); *Shure* v. *Rubenstein Bros. Jewelry Co.,* 10 WH Cases 657, 21 Labor Cases, Par. 66,899 (N. D. Ill.); *Tobin* v. *Wenatchee Air Service, Inc.,* 10 WH Cases 680, 21 Labor Cases, Par. 67,019 (E. D. Wash.); *Tobin* v. *Ewbank Motor Freight Lines, Inc.,* 11 WH Cases 354, 23 Labor Cases, Par. 67,411 (W. D. Tenn.).

[10] The decision of the Court of Appeals for the Fifth Circuit in the case of *Mitchell* v. *Ralph Adams d/b/a Macon Shirt Co.*, 230 F. 2d 527, decided March 7, 1956, expresses agreement with the First Circuit's construction of Section 7 (e). However, in a previous decision of the Fifth Circuit that court specifically approved the more limited construction of Section 7 (e). *Beechwood Lumber Co.* v. *Tobin*, 199 F. 2d 878, at 881.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

SIMON E. SOBELOFF,
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STUART ROTHMAN,
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United States Department of Labor.

MAY 1956.

APPENDIX

No. 4996

MITCHELL, ETC.

v.

BRANDTJEN & KLUGE, INC.

December 15, 1955

Appeal from the U. S. District Court for the District of Massachusetts (129 F. Supp. 675). Affirmed.

Bessie Margolin, Assistant Solicitor, with whom Stuart Rothman, Solicitor, Harry A. Tuell, and Thomas L. Thistle, Regional Attorney, were on brief, for appellant.

David W. Kelley, of Boston, Mass., with whom Peter D. Cole, Badger Pratt, Doyle & Badger, of Boston, Mass., and Felhaber & Larson, of St. Paul, Minn., were on brief, for appellee.

Before MAGRUDER, Chief Judge, and WOODBURY and HARTIGAN, Circuit Judges.

MAGRUDER, *Chief Judge*: In this case the Secretary of Labor filed a complaint seeking an injunction against defendant-appellee forbidding the corporation from violating the overtime provisions of § 7 of the Fair Labor Standards Act of 1938, as amended, 52 Stat. 1063; 63 Stat. 912. The district court found that the wage payments which defendant had been making to its employees in question, in weeks in which any of them

worked more than 40 hours, had been in pursuance of bona fide individual contracts of employment which in all respects complied with the requirements of § 7 (e) of the Act. Accordingly the court ruled that the evidence did not warrant a finding that the defendant had violated the provisions of § 7, and entered judgment dismissing the complaint, from which judgment the Secretary of Labor has taken the present appeal.

Subsection (e) of § 7 was added to the Act by the amendments of 1949 in order to give specific legislative sanction to wage arrangements of the "*Belo*"-type, which the Supreme Court had theretofore approved, by a sharply divided Court and without the aid of express statutory language, in *Walling* v. *A. H. Belo Corp.*, 316 U. S. 624 (1942).

The difficulty which gave rise to the litigation in the *Belo* case was that, in § 7 of the original act as enacted in 1938, there was no statutory definition of what Congress meant by the phrase "the regular rate at which he is employed." Section 7 (a) provided, with exceptions not now relevant, that no employer should employ any of his employees who is engaged in commerce or in the production of goods for commerce, as defined, for a workweek longer than 40 hours, "unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

It became firmly established that an employer might be guilty of an overtime violation under § 7, even though the total compensation which an employee of his might have received for a work-

week in excess of 40 hours was equal to or in excess of the minimum hourly rate prescribed in § 6, for 40 hours of work, plus time and one-half such minimum hourly rate for every hour in the workweek in excess of 40 hours. *Overnight Motor Transportation Co., Inc.,* v. *Missel,* 316 U. S. 572, 577–78 (1942). Also, it became established that the contract of employment need not express the agreed compensation in terms of an hourly rate, but might, for example, fix the compensation in terms of a lump sum weekly salary, regardless of the number of hours worked in any particular workweek. In such a case "the regular rate" for a particular week had to be determined by translating the agreed weekly salary into an hourly rate, through the device of dividing the amount of salary paid for the week by the number of hours actually worked in that week; and if the employee worked more than 40 hours in any particular week he was entitled to receive extra compensation for such excess hours, in addition to his weekly salary, in an amount at least equal to one-half the regular hourly rate so determined. See *Overnight Motor Transportation Co., Inc.* v. *Missel, supra,* at 580. As the Supreme Court explained in the *Missel* case, instead of forbidding outright any employment in excess of 40 hours a week, as Congress might constitutionally have done, Congress chose, in general, to discourage such overtime work by making it cost something extra to the employer to work his employees in excess of 40 hours a week.

> By this requirement, although overtime was not flatly prohibited, financial pressure was applied to spread employment to

> avoid the extra wage and workers were assured additional pay to compensate them for the burden of a workweek beyond the hours fixed in the Act. In a period of widespread unemployment and small profits, the economy inherent in avoiding extra pay was expected to have an appreciable effect in the distribution of available work. Reduction of hours was a part of the plan from the beginning. 316 U. S. at 577–78.

In the *Belo* case, the Supreme Court had before it an employer who, prior to the effective date of the Fair Labor Standards Act, had been paying weekly salaries by way of compensation to employees the length of whose workweeks fluctuated widely from week to week. If the compensation basis had been shifted merely to an hourly rate, the employees, due to the irregular hours of employment, never could count on an assured compensation per week. For the dual purpose of conforming its wage arrangements to the requirements of the Act, and at the same time to assure its employees that their previous weekly salaries would not be reduced, the employer entered into bona fide individual contracts of employment which fixed the employee's basic or regular rate of pay at an hourly rate substantially in excess of the minimum prescribed in § 6, and provided that the employee would receive not less than one and one-half times this basic hourly rate for each hour worked in excess of the maximum workweek stipulated in § 7, with a guaranty to the employee that, regardless of the fluctuations in the length of the workweeks, he would always receive at least an amount equivalent to his prior weekly salary. Under the contracts, because of

the fixed relationship between the stipulated hourly rate and the weekly guaranty, each employee had to work at least 54½ hours a week before his guaranty was exceeded, in which event he would be compensated for the hours worked in excess of 54½ at a rate equal to time and one-half the basic hourly rate; but whether he worked 30 hours or 54½ hours in a particular workweek, the employee was still assured of receiving his guaranteed weekly salary. As indicating that the hourly rate stipulated in the contract was not an artificial or fictitious contrivance, the Court emphasized that whenever an employee received a raise in pay the employer would make a conjoint adjustment both of the employee's basic hourly rate and of his guaranteed weekly salary.

The Supreme Court upheld the foregoing wage arrangement in the Belo case. The basic hourly rate specified in the contract became the lawful "regular rate," and this was still true despite the additional provision of a weekly guaranty. There was such a consistent and reasonable relationship between the stated hourly rate and the guaranteed weekly sum that, in any week in which the employee worked a number of hours in excess of the maximum fixed in § 7 [44 hours originally, now 40] but not enough to exceed the weekly guaranty, the parties might fairly be deemed to have contemplated that the guaranteed weekly sum embraced two factors: (1) A sum equal to 44 hours of employment [now it would be 40] at the basic hourly rate, and (2) the balance, regarded as the equivalent of not less than one and one-half times the basic hourly rate for each hour worked in excess of the statutory maximum. In

any week in which the employee worked in excess of the statutory maximum, but less than 54½ hours, it was true that this assumed overtime component of the guaranteed weekly wage was a sum in excess of that arrived at by applying the formula of time and one-half the stipulated basic hourly rate. However, the Court pointed out: "But the Act does not prohibit paying more; it requires only that the overtime rate be 'not less than' 150% of the basic rate." 316 U. S. at 632.

From the start, the Administrator of the Wage and Hour Division has disliked the Belo decision and has sought to whittle it down because, to the extent that it was applicable, an employer might make a wage bargain with his employees which would permit him to work them for hours in excess of the maximum specified in § 7 without having to pay a premium therefor, provided the weekly guaranty is not exceeded. While this is true enough, the answer of the Supreme Court in the *Belo* case was as follows (316 U. S. at 635):

> When employer and employees have agreed upon an arrangement which has proven mutually satisfactory, we should not upset it and approve an inflexible and artificial interpretation of the Act which finds no support in its text and which as a practical matter eliminates the possibility of steady income to employees with irregular hours. Where the question is as close as this one, it is well to follow the Congressional lead and to afford the fullest possible scope to agreements among the individuals who are actually affected. This policy is based upon a common sense recognition of the special problems confronting employer

> and employee in businesses where the work hours fluctuate from week to week and from day to day. Many such employees value the security of a regular weekly income. They want to operate on a family budget, to make commitments for payments on homes and automobiles and insurance. Congress has said nothing to prevent this desirable objective. This Court should not.

Accordingly, the Supreme Court declined to overrule the *Belo* case in *Walling* v. *Halliburton Oil Well Cementing Co.*, 331 U. S. 17 (1947), but on the contrary applied it to approve a wage arrangement whereunder the employees had to work more than 84 hours a week in order to exceed their weekly guaranties and thus earn additional compensation at one and one-half times the stipulated regular hourly rate.

When in 1949 the Congress set itself the task of making an extensive revision of the Fair Labor Standards Act, it determined to write into the law a provision giving specific approval to wage arrangements of the Belo type. Whereas the Administrator has regarded it as a basic and overriding policy of the original act to encourage employers to "spread the work" by the device of exacting from them a wage premium for hours worked in excess of the maximum stipulated in § 7, it may be that in the economic conditions prevailing in 1949 the Congress did not deem this policy to be so strong and controlling as it might have been in 1938 when the Act was originally passed. At any rate, it is clear from what the Congress did in 1949 that it thought that there were important counter-considerations of policy

applicable in the cases of employers with wide and unpredictable fluctuations of the workweek. The policy decision was one for the Congress to make, whatever the Administrator, or the courts, might think as to its wisdom. Section 7 (e), which the Congress added in 1949, reads as follows (63 Stat. 914):

> No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of forty hours if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in section 6 (a) and compensation at not less than one and one-half times such rate for all hours worked in excess of forty in any workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified.

Notwithstanding this new § 7 (e) appellant urges that the case at bar is determined by the ruling of this court in *McComb* v. *Roig,* 181 F. 2d 726 (1950). We think this is clearly not so, since the overtime compensation which we held to be due in the *Roig* case was for workweeks *prior* to the effective date of the 1949 amendments, and we pointed out (181 F. 2d at 727) that "Congress has finally, in the 1949 amendments, 63 Stat. 910, supplied more detailed statutory guides in the Belo and related situations, but these amendments

do not control the disposition of the case at bar;" in the *Roig* case we did not consider the provisions of § 7 (e) at all.

Though the present case involves overtime compensation alleged to be due for workweeks as to which the new § 7 (e) is undoubtedly applicable, if we understand appellant's contention we are to decide this case just as though § 7 (e) had not been enacted, which would throw us back into the morass of cases in which the courts, groping in the dark, so to speak, without specific statutory guidance, were struggling with the implications of the Belo doctrine, as enunciated originally in *Walling* v. *A. H. Belo Corp.*, 316 U. S. 624 (1942). We think no such burden now rests upon us. Though the legislative history makes clear that the Congress had the Belo decision in mind when it enacted the self-sufficient substantive provisions of new § 7 (e), we cannot infer that the Congress mean § 7 (e) to be merely clarifying language approving the principle of the *Belo* case as elaborated and applied in subsequent court decisions. Upon the contrary, the concluding language in § 7 (e) requires that the contract of employment must provide "a weekly guaranty of pay for not more than sixty hours based on the rates so specified"—which would rule out such a wage agreement as was present in *Walling* v. *Halliburton Oil Well Cementing Co.*, 331 U. S. 17 (1947), though the Supreme Court had regarded that wage agreement as being lawful and valid within the principle of the *Belo* case. On the other hand, it is clear that the Congress has disapproved such decisions as *Bay Ridge Operating Co., Inc.* v. *Aaron*, 334 U. S.

446 (1948), for it promptly amended the Act to overturn the ruling in that case, notwithstanding the fact that a majority of the Court had held that the wage agreement there involved was not within the Belo principle and did not save the employer from making additional overtime payments for work in excess of the statutory maximum. See 63 Stat. 446; Sen. Rep. No. 402, 81st Cong., 1st Sess. The substance of this amendment now appears in §§ 7 (d) (5), (6) and (7), and § 7 (g) of the Act. See 63 Stat. 914, 915.

Therefore we think that the new § 7 (e) enables the courts to make a fresh start, and in any case of wage agreements which fall within the unambiguous language of that subsection, the employer must be deemed not to have violated the overtime provisions of § 7 (a), whatever the courts might have held without the statutory guidance of § 7 (e).*

*Though we do not in the present case have to decide the point, it may be that wage agreements in terms like those we dealt with in *McComb* v. *Roig*, 181 F. 2d 726 (1950), would not fall within the saving provisions of § 7 (e). The argument would be that when § 7 (e) requires that a bona fide contract of employment must specify, among other things, "a regular rate of pay of not less than the minimum hourly rate provided in section 6 (a)," it is not enough that the contract of employment may name an hourly rate and label it the "regular rate of pay," where it is obvious that such hourly rate is merely an arbitrary and fictitious figure not really meant by the parties to be the basis upon which the agreed compensation is to be calculated. As we pointed out in the *Roig* case, all the employees there concerned, regardless of the wide differences in the kind of jobs that they severally performed, were listed as working at the same contract hourly rate of 47 cents, though their weekly guaranties varied from $24.41 to $40.00. Since there was an absence of

With the foregoing preliminary observations, we now come to the facts of the present case. They are contained in an agreed stipulation and are not in dispute.

Appellee is a Minnesota corporation engaged in the manufacture, sale, distribution, installation and repair of printing presses, and related equipment. Though it has its headquarters at St. Paul, Minn., it operates eleven branch offices in various cities and states throughout the country, at which branch offices it employs one or more persons known as "erectors." The number of erectors employed at any one time was subject to variation, but during the period from August 1, 1950, to September 6, 1953, appellee employed a total of seventeen erectors at its various branch offices, including the one in Boston, Massachusetts.

Each of these erectors was employed under a standard form of individual contract which specified that the employee's "basic rate of pay" would be a certain amount per hour (in all cases in excess of the minimum stated in § 6) for the

any logically consistent or reasonable relation, either on an individual or on a group basis, between the weekly guaranties and the specified hourly rates, we concluded that the hourly rates of 47 cents mentioned in the contracts were artificial contrivances which did not really set the "regular rate" at which the workers were employed; and that therefore the plan failed "even though it is true that four of the eight workers involved, at times, though not often, took home more than their weekly guaranties." 181 F. 2d at 730. We also pointed out that it is a clear indication that the stated hourly rate is wholly artificial if the employees from time to time receive wage increases in the form of increases in the weekly guaranties while the hourly rate remains unchanged.

first 40 hours of work each week, and provided further that for time employed over 40 hours during each week the employee would receive for such excess hours "not less than one and one-half times such basic rate above mentioned," with a guaranty on the part of the employer that the employee would receive at least a stated minimum sum each week. This sum was designed to be the equivalent of what the employee would receive for 48 hours of work at the stated basic hourly rate for the first 40 hours and one and one-half times such basic rate for the additional eight hours. Thus since the guaranty assured to each employee weekly earnings which would be equivalent to what he would earn at the basic hourly rate, plus statutory overtime, for 48 hours of employment each week, the contracts clearly complied with the concluding requirement of the new § 7 (e) to the effect that the weekly guaranty must be "for not more than sixty hours based on the rates so specified."

The hours worked by the said erectors during a workweek varied widely from week to week and from erector to erector due largely to the irregularity and unpredictability of demand for their services. This variation ranged from a minimum of eight hours a week in one case to a maximum of 75 hours a week in another. More often than not these erectors worked less than 40 hours a week, but in over 20 percent of the total number of workweeks in which these seventeen erectors were employed the hours worked were in excess of 40, and in about 3 percent of the total workweeks the hours worked were in excess of the 48 upon which the guaranty was based; and of course in these

cases where the erector worked more than 48 hours and thus exceeded his guaranty, he received additional compensation for the hours in excess of 48 on the basis of one and one-half times his stated hourly rate. The individual contracts of employment in the present case thus indubitably met another requirement of § 7 (e) of the Act in that the duties of the employees involved necessitated "irregular hours of work."

As bearing on the genuineness of the basic hourly rate stated in the contracts, it is a fact that whenever one of the erectors received an increase in pay a new contract was issued to the employee and signed by him to signify his acceptance, with appropriate changes therein both in the basic hourly rate and in the weekly guaranty so as to maintain the consistent relationship between the hourly rate and the weekly guaranty, the amount of the guaranty being in all cases designed to assure to the employee weekly earnings equivalent to what he would receive for 48 hours of employment at the stated basic hourly rate for the first 40 hours and the statutory overtime thereon for the additional eight hours.

We are in entire agreement with the following paragraphs from the opinion of the district court:

> In this case the wage plan employed by the defendant clearly complies with the provisions of Section 7 (e) in the following respects: the employment contracts specify as a regular rate of pay an hourly sum which in each case is at or above the minimum prescribed by the Act; compensation at not less than one and one-half

> times the hourly rate is provided for all hours worked in excess of forty in any workweek; and a weekly guarantee of pay is also provided for not more than sixty hours based on the rate specified. In this case the guarantee is for forty-eight hours of work.
>
> There does not seem to be any dispute either as to the fact that the employees are employed pursuant to bona fide individual contracts. In any case, I find this to be the fact. I also find from the evidence in the case that the duties of the erectors necessitate irregular hours of work. This fact is apparent from but a cursory examination of the payroll records of the employees. Thus the wage contracts in this case comply in all respects with the express provisions of Section 7 (e), *supra*, and for this reason should be sustained by this Court.

It would, in our opinion, be unwarranted judicial legislation on our part to read into § 7 (e) another requirement which the Congress chose not to put there, namely, that under individual contracts which in all other respects comply with § 7 (e) the employees concerned must, in a certain percentage of workweeks, or in a "substantial" or a "significant" number of workweeks, actually have worked enough hours to exceed their respective guaranties so as to entitle them to extra compensation for such excess hours on the basis of time and one-half the basic hourly rate. This contention by the government was rightly rejected in *Tobin* v. *Little Rock Packing Co.*, 202 F. 2d 234 (C. A. 8th, 1953), cert. denied, 346 U. S. 832 (1953). To the same effect see

Mitchell v. *Adams*, 129 F. Supp. 377 (D. C. M. D. Ga. 1955).

Similarly, we think we would not be warranted in reading into § 7 (e) an additional requirement that the weekly guaranty must be based upon an assumed *average* number of hours the employee might be expected to work per week during the performance of a contract of employment of indefinite duration. The only requirement in this respect which the Congress chose to insert in § 7 (e) was that the weekly guaranty must not be for "more than sixty hours based on the rates so specified."

So far as the record discloses, the employees concerned have not complained, but are satisfied with the wage bargains they respectively made, under which they are assured of a stable weekly pay notwithstanding that the nature of their employment is such as to make inevitable a wide and unpredictable fluctuation in the number of hours actually worked per week. In this aspect of the case, the observations of the Supreme Court in the *Belo* case (316 U. S. at 635), which we have quoted earlier in this opinion, are very much in point and have an obvious persuasive force.

The judgment of the District Court is affirmed.

On the same day, December 15, 1955, the following judgment was entered:

Judgment

December 15, 1955

This cause came on to be heard on the record on appeal from the United States District Court

for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

(S) ROGER A. STINCHFIELD,
Clerk.

Supreme Court of the United States

No. —, October Term, 1955

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED DEPARTMENT OF LABOR

v.

BRANDTJEN & KLUGE, INCORPORATED

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April ninth, 1956, without prejudice to a further extension.

(S) FELIX FRANKFURTER,
Associate Justice of the Supreme Court of the United States.

Dated this ninth day of March 1956.

Supreme Court of the United States

No. —, October Term, 1955

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

BRANDTJEN & KLUGE, INCORPORATED

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May twelfth, 1956.

(Sgd.) FELIX FRANKFURTER,
Associate Justice of the Supreme Court of the United States.

Dated this fifth day of April 1956.

The provisions of Section 7 (d) and (g) of the Fair Labor Standards Act (c. 676, 52 Stat. 1060, as amended, c. 736, 63 Stat. 910; 29 U. S. C. 201, *et seq.*), are as follows:

> (d) As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include—
>
> * * * * *
>
> (5) extra compensation provided by a premium rate paid for certain hours

worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or forty in a workweek or in excess of the employee's normal working hours or regular working hours, as the case may be;

(6) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days; or

(7) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding forty hours), where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek.

* * * * *

(g) Extra compensation paid as described in paragraphs (5), (6), and (7) of subsection (d) shall be creditable toward overtime compensation payable pursuant to this section.

U. S. GOVERNMENT PRINTING OFFICE: 1938